

88 - 632

No.

Office-Supreme Court, U.S.

FILED

OCT 13 1983

ROSEMARIE L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

ROSEMARIE MONDELLI,

Plaintiff-Petitioner,
against

UNITED STATES OF AMERICA,

Defendant-Respondent.

Petition for a *Writ of Certiorari* to the United States
Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

STEVEN J. PHILLIPS
Counsel for Petitioner
KREINDLER & KREINDLER
99 Park Avenue
New York, New York 10016
(212) 687-8181

Of Counsel:

STEVEN J. PHILLIPS
DONALD I. MARLIN
DIANE M. PAOLICELLI

QUESTION PRESENTED

Where a young child suffers grievous and direct personal injury as a consequence of governmental misconduct, must she be denied all relief merely because that misconduct was also inflicted upon her father, a serviceman on active duty?

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	2
JURISDICTION.....	3
STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE.....	4
Introduction.....	4
Petitioner's Factual Contentions...	9
REASONS FOR GRANTING THE WRIT.....	12
POINT I	
THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH AN EARLIER DECISION OF THIS COURT.....	12
POINT II	
THE HOLDING OF THE CIRCUIT COURT IS AN UNNECESSARY AND UNWARRANTED EXTENSION OF THE POLICY CONCERNS ANNOUNCED BY THIS COURT IN FERES, AND THUS PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED AND SET- TLED BY THIS COURT.....	18

POINT III

THE CIRCUIT COURT'S INTERPRETA-
TION OF THE FTCA, WHICH TREATS
ROSEMARIE MONDELLI DIFFERENTLY
FROM SIMILARLY SITUATED CIVILIAN
INFANTS, PURELY ON THE BASIS OF
HER STATUS AS THE CHILD OF A
FORMER SERVICEMAN, PRESENTS AN
EXCEPTIONALLY IMPORTANT QUESTION
OF FEDERAL CONSTITUTIONAL LAW,
WHICH SHOULD BE REVIEWED AND
SETTLED BY THIS COURT.....

28

CONCLUSION..... 35

APPENDIX

TABLE OF AUTHORITIES

<u>Cases Cited</u>	<u>Page</u>
<u>Allen v. United States,</u> 527 F. Supp. 476 (D. Utah 1981).....	15
<u>Brooks v. United States, 337 U.S.</u> 49 (1949).....	14
<u>Bulloch v. United States, 133 F.</u> Supp. 885 (D. Utah 1955).....	15,16
<u>Bulloch v. United States,</u> No. C-81-01236 (D. Utah filed Aug. 14, 1982).....	16
<u>Chappell v. Wallace, ___ U.S. ___,</u> 76 L. Ed. 2d 586 (1983).....	26,27
<u>Feres v. United States, 340 U.S.</u> 135 (1950).....	Passim
<u>Gomez v. Perez, 409 U.S. 535</u> (1973).....	29
<u>Hinkie v. United States, 524</u> S. Supp. 277 (E.D. Pa. 1981), rev'd., ___ F.2d ___ (3d Cir.) (No. 82- 1554, August 18, 1983).....	26
<u>In re Agent Orange Products</u> <u>Liability Litigation, 506</u> F. Supp. 762 (E.D.N.Y. 1980).....	24

<u>Cases Cited</u>	<u>Page</u>
<u>International Assoc. of Machinists</u> <u>v. Street</u> , 367 U.S. 740 (1961).....	37
<u>Jessup v. United States</u> , No. 79-271-TUC-R,B (D. Ariz. 1980).....	21,26
<u>Laswell v. Brown</u> , 524 F. Supp. 847 (W.D. Mo. 1981), <u>aff'd</u> , 683 F.2d 261 (8th Cir. 1982), <u>cert.</u> <u>denied</u> , <u>Laswell v. Weinberger</u> , U.S. ___, 103, S. Ct. 1205, (1983).....	24,26
<u>Levy v. Louisiana</u> , 391 U.S. 68 (1968).....	30
<u>Lombard v. United States</u> , 690 F.2d 215, (D.C. Cir. 1982), <u>cert.</u> <u>denied</u> U.S. ___, 103 S. Ct. 3086 (1983).....	24,26
<u>Mathews v. Lucas</u> , 427 U.S. 495 (1976).....	31
<u>Mills v. Habluetzel</u> , 456 U.S. 91, (1982).....	29
<u>Monaco v. United States</u> , 661 F.2d 129 (1981), <u>cert. denied</u> , 456 U.S. 989, (1982).....	24
<u>O'Callahan v. Parker</u> , 395 U.S. 258 (1969).....	35
<u>Phillips v. United States</u> , 508 F. Supp. 537 (D.S.C. 1980).....	23

<u>Cases Cited</u>	<u>Page</u>
<u>Plyler v. Doe</u> , 457 U.S. 202, (1982).....	29,32, 35
<u>Reid v. Covert</u> , 354 U.S. 1 (1956).....	35
<u>Relford v. Commandant</u> , 401 U.S. 355 (1971).....	35
<u>Scales v. United States</u> , 685 F.2d 970 (5th Cir. 1982) cert. denied, ___ U.S. ___, 103 S. Ct. 1772 (1983).....	24,26
<u>Sigler v. LeVan</u> , 485 F. Supp. 185 (D. Md. 1980).....	22,26
<u>Stencel Aero Engineering Corp. v. United States</u> , 431 U.S. 666 (1977).....	25
<u>Toth v. Quarles</u> , 350 U.S. 11 (1955).....	35
<u>Trimble v. Gordon</u> , 430 U.S. 762 (1977).....	29,31, 32
<u>United States v. Brown</u> , 348 U.S. 110 (1954).....	Passim

Cases Cited

Page

<u>Weber v. Aetna Casualty & Surety</u> <u>Co.</u> , 406 U.S. 165 (1972).....	29,30, 31
--	--------------

Statutes Cited

28 U.S.C.

Sec. 1254(1).....	3
Sec. 1331.....	3
Sec. 1346(b).....	3
Sec. 2671-2680 (1976 and Supp. 1979).....	4

Rules Cited

Federal Rules of Civil Procedure Rule 12(b)(1).....	7
--	---

Other Authorities Cited

<u>From Feres to Stencel: Should</u> <u>Military Personnel Have Access</u> <u>to FTCA Recovery?</u> , 77 Mich. L. Rev. 1099, 1115 (1979).....	35
--	----

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1983

ROSEMARIE MONDELLI,

Plaintiff-Petitioner

-against-

UNITED STATES OF AMERICA,

Defendant-Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Rosemarie Mondelli prays for a
writ of certiorari to review a judgment of the
United States Court of Appeals for the Third
Circuit, entered in these proceedings on July
15, 1983, which reversed an Order of the

United States District Court for the District of New Jersey entered in these proceedings July 19, 1982, and which denied the infant plaintiff the right to any and all relief for her own grievous and directly suffered personal injuries, caused by governmental misconduct and breach of duty owed directly to her, merely because that misconduct was also visited upon her father, a serviceman on active duty.

OPINION BELOW

The opinion of the Court of Appeals, reversing the Order of the District Court, appears at page A8 to A14 of the attached appendix, and is reported at 711 F.2d 567 (1983).

The District Court did rendered an oral opinion in this matter, which appears at page A1 to A7.

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The federal courts have jurisdiction of the controversy by virtue of the existence of a federal question. 28 U.S.C. §1331.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1346(b)

"... The district courts ... shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office and employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

STATEMENT OF THE CASE

Introduction

It is well settled, and not a subject of dispute, that a civilian is entitled to bring a lawsuit against the United States under the Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671-2680 (1976 and Supp 1979)(hereafter "FTCA"), for injuries brought about at the hands of government officials and agents. The FTCA was designed, after all, as a waiver by the United States of its immunity from suit for certain tort actions. It is likewise well settled, and not at issue in this case, that, as a narrow exception to this waiver of immunity, a serviceman who is injured by government misconduct in the line of active military duty may not sue the government for damages. Feres v. United States, 340 U.S. 135 (1950) [hereafter "Feres"]. At first blush, the factual setting of this case seems to fall

squarely between these two established principles: whether an FTCA claim exists for a civilian child who sustains direct bodily injury because her father's genetic material was damaged by governmental misconduct inflicted upon him while a serviceman on active duty.

Rosemarie Mondelli, a 22-year-old civilian, was born with retinal blastoma, a genetically transmitted cancer of the retina, which was induced when the United States exposed her father to nuclear radiation. At age two, this condition necessitated the removal of her left eye and optic nerve and their replacement with an artificial eye. This petition arises out of the Circuit Court's dismissal of Rosemarie's FTCA claim based on her injuries.

Because of the peculiar factual context of this case -- an injured serviceman serving as a "conduit" for a direct injury to his

civilian child -- the various federal courts which have addressed the issue have struggled to fit this case into one or another of the principles stated above. In so doing, they have produced a morasse of conflicting and often unreasoned decisions.

But when the factual trappings are put aside, this case is not one bit different from United States v. Brown, 348 U.S. 110 (1954), decided by this Court almost thirty years ago. In Brown, this court squarely held that a civilian is entitled to bring an FTCA claim, even if, as here, the underlying injury is related to active duty military misconduct. In short, it is critically important that this court review the instant case and reiterate its holding in Brown, so as to provide guidance to the lower courts.

At bottom, Rosemarie's claim is identical to those of countless other individuals who

sue in tort for injuries inflicted upon them prior to their birth by the negligent conduct of others. Nevertheless, the government moved to dismiss this action pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, urging upon the District Court that Rosemarie must be denied her day in court, or the possibility of any remedy, no matter how just her complaint or how grave her injury, merely because of her status as the daughter of an irradiated former serviceman. In essence, it argued that the exception to the FTCA's general waiver of sovereign immunity created by this Court in Feres, which bars servicemen from suing for their own service-related injuries, somehow must be extended to also bar suits by servicemen's dependents for their own wrongfully inflicted somatic injuries.

This extraordinary contention -- that an infant herself directly wronged and herself

directly injured may be denied any remedy -- was emphatically rejected by the District Court. Judge Stern having first obtained from government counsel the concession that this Court had never held that a civilian family member's own direct FTCA claim was barred by Feres, proceeded to analyze the rationales underlying Feres in order to determine whether they might apply to Rosemarie's case. In concluding that they did not, Judge Stern said, in part:

I can see no more danger in military discipline in permitting this civilian to sue than any other civilian to sue for any other kind of military decision which injures other civilians. I find no authority in the words of the statute of the United States Congress for this Court, to read into those words a disenfranchisement of this little girl as opposed to any other little girl.

If she were the yet unborn child of a...civilian resident of Los Alamos or some other area where this test was performed, she would have the right to sue. The government has conceded as much.

I find no words in the statute. I find no policy of Feres. I certainly find no ameliorating circumstance of her getting any benefit in any other way which would authorize this Court to turn its face away from her. [A3-4].

On appeal, a panel of the Circuit Court unanimously reversed the District Court, concluding "with reluctance" that Feres bars Rosemarie's direct action merely because of her status as a serviceman's daughter and the military nature of the underlying misconduct. [A13-14]. In so doing, the Court explicitly acknowledged "the injustice to Rosemarie Mondelli of this result", but felt constrained nonetheless to dismiss the action. [A13-14]. The instant petition for a writ of certiorari follows.

Petitioner's Factual Contentions

Plaintiff's father, Daniel Mondelli, while on active military duty in 1953, had

been ordered by his military superiors to participate in a test of a nuclear device conducted at Camp Desert Rock in the State of Nevada. He was ordered to stand very near to the site of the nuclear bomb explosion and to move toward the blast area. Upon the explosion of the nuclear device, Daniel Mondelli was exposed to highly dangerous radiation. [Complaint ¶¶ 4, 5, 11, 13 and 14].

The defendant United States negligently and recklessly planned and organized the nuclear test at which plaintiff's father was irradiated in violation of its duties to both plaintiff and her father. It knew, or should have known, both prior to and at the time of the testing, that the effects of exposure to high levels of radiation would cause damage to the children of those individuals exposed to the radiation and certainly to the children of those servicemen who were ordered to attend.

Defendant, however, disregarded this knowledge and recklessly and negligently ordered plaintiff's father to attend the test without warning him of the possible health dangers to him and his unborn children. It did not warn Daniel Mondelli of these hazards as it sought to conduct experiments, upon his body and upon those of his unborn children, in order to determine the effects of nuclear radiation. [Complaint ¶¶ 4, 10, 11, 13 and 14].

In addition, defendant negligently and recklessly carried out the nuclear test. It failed to provide Daniel Mondelli with any protective devices. Such a protective device might have shielded him and might have protected his unborn children from the type of injury that Rosemarie sustained. [Complaint ¶ 5].

Daniel Mondelli was merely the conduit of the injuries sustained by his daughter,

Rosemarie. The radiation caused genetic damage, which although of no direct harm to him, caused the gravest of injuries to Rosemarie. She was born on August 25, 1960, with cancer of the retina as a direct consequence of the government's misconduct. [Complaint ¶¶ 8 and 9].

REASONS FOR GRANTING THE WRIT

POINT I

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH AN EARLIER DECISION OF THIS COURT

In unequivocal terms, this Court has long ago held that a civilian such as Rosemarie may maintain an FTCA action against the United States for military service related torts. United States v. Brown, 348 U.S. 110 (1954). In Brown, this Court left no doubt that even where the claim bears some connection with

active military service, the injured civilian is entitled to sue.

This Court directly held in Brown, supra, that the Feres doctrine is totally inapplicable to an FTCA suit for injuries suffered by a civilian. That doctrine merely holds that a serviceman who suffers negligently inflicted service connected injury while on active duty may not recover damages in an FTCA suit.

The plaintiff in Brown, however, was a civilian, a former serviceman who was suing for negligent post-discharge treatment of an injury that had occurred while he was in active service. Although the negligent conduct unquestionably bore a relationship to a service related injury, and could be traced to active duty service, this Court found the plaintiff's civilian status to be determinative. Since plaintiff "enjoyed civilian status" -- he was not "on active duty or sub-

ject to military discipline" when the misconduct occurred -- Feres was totally inapplicable. 348 U.S. at 112; see also, Brooks v. United States, 337 U.S. 49, 52 (1949) (servicemen could sue under FTCA where injury was not in the course of their military service).

The Brown decision makes it plain that the crucial consideration is the plaintiff's civilian status at the time of the wrongdoing, and not the possible service relationship of the injury. Indeed, the dissent in Brown made the same argument advanced by the Circuit Court below: "In this case, however, the injury is inseparably related to military service But for his army service, this veteran could not have been injured" 348 U.S. at 114 (dissenting opinion) (emphasis added).

In the wake of the Brown decision, it has become commonplace for civilians to maintain

suits based upon military misconduct. By way of illustration, in a case involving the very atomic testing here at issue, civilians living "downwind" from the test sites are currently prosecuting their FTCA lawsuit for personal injuries. See Allen v. United States, 527 F. Supp. 476 (D. Utah 1981). At the same time, those who sustained property damages as a result of the radioactive fallout -- sheepherders whose flocks were injured -- are unquestionably entitled to maintain an FTCA action. Bulloch v. United States, 133 F. Supp. 885 (D. Utah 1955). Although the sheepherders originally were unsuccessful in their suit, the Court only recently vacated the adverse judgment on the ground that the government had deliberately concealed crucial evidence. Bulloch v. United States, No. C-81-01236 (D. Utah, filed August 4, 1982).¹

¹ In the Bulloch and related cases, the
(footnote continued)

Like the plaintiffs before this Court in Brown, and before the district courts in Allen and Bulloch, Rosemarie Mondelli is and was a civilian at all relevant times. Rosemarie has received and is seeking recompense for injury in her own right and thus is in no sense making a derivative claim. Had Rosemarie only asserted a derivative claim for losses occa-

(footnote continued from previous page)
District Court heard evidence on the issue of whether damage to the sheep was a result of atomic testing. The government produced overwhelming expert testimony to negate the plaintiffs' claims, and the court, believing that evidence to be controlling, entered judgment in favor of the defendant. In 1979, Congress and the United States Department of Health, Education and Welfare made an independent investigation of the health effects of the Nevada nuclear tests in the 1950's and 1960's. New information, formerly classified and unavailable to the public, was then released, and the Bulloch plaintiffs brought an action to set aside the 1956 judgment. The court found that representatives of the United States government had intentionally and misleadingly concealed evidence, and accordingly vacated the 1956 judgment. Bulloch v. United States, No. C-81-01236 (D. Utah, filed August 4, 1982).

sioned by a negligently inflicted injury to her serviceman father -- such a loss of parental care and guidance -- the Circuit Court's decision might be understandable. As it is, however, Rosemarie is suing for injuries she personally sustained. Under the binding authority of Brown, her claim must be permitted to go forward.

At bottom, the decision of the Circuit Court resurrects the precise argument long-ago rejected by this Court in Brown: that a claim for injuries is barred when those injuries would not have occurred "but for" a military service connection. This Court should not allow this erroneous decision to stand.

POINT II

THE HOLDING OF THE CIRCUIT COURT IS AN UNNECESSARY AND UNWARRANTED EXTENSION OF THE POLICY CONCERNS ANNOUNCED BY THIS COURT IN FERES, AND THUS PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE REVIEWED AND SETTLED BY THIS COURT

Upon even cursory analysis, the policy considerations carefully articulated by this Court in Feres to carve a limited exception to FTCA suits by servicemen on active duty provide no basis for overriding a civilian's right to an FTCA remedy for injuries personally suffered. In Brown, a post-Feres decision, this Court plainly pointed out that the policies motivating the narrow Feres doctrine entirely lose their force where, as here, it is a civilian who is injured. 348 U.S. at 112. Nevertheless, without so much as citing the Brown decision, and, indeed, without even superficial analysis of the Feres policies as they apply to the facts of this child's FTCA

claim, the Circuit Court summarily dismissed Rosemarie's action.

What makes it all the more pressing for this Court to review the Circuit Court's decision is the already existing confusion among the various federal courts, some of which have correctly allowed civilian claims, and others, without considering Brown, have misapplied and misinterpreted Feres. It is therefore extremely important for this Court to reiterate its holding in Brown, to provide proper guidance to the lower federal courts.

In the factual context of a civilian affected by military wrongdoing, the four policy considerations of Feres -- the distinctly federal nature of the relationship between service personnel and government, the availability of Veterans' Benefits Act compensation, the need to maintain military discipline and the concern that application of

differing standards of local tort law might interfere with the unique relationship between soldier and superior -- are entirely inapplicable. Even the Circuit Court conceded that civilians are not part of the "distinctively federal relationship" between the government and the members of the armed forces, that they are not entitled to any compensation whatsoever under the Veterans' Benefits Act, and that their only redress for the injuries inflicted upon them is the FTCA. [All & n.5]. In fact, the Circuit Court admitted that the only Feres rationale it felt was applicable and, indeed, the sole ground for the court's decision, was the need to preserve military discipline.

But this "military discipline" rationale could not be more misplaced in the context of a civilian's suit. First, civilians such as Rosemarie are not and could not be subject to

military discipline. More to the point, other civilians are unquestionably entitled to and are, in fact, now currently pursuing their FTCA remedy for the very atomic test at issue here. Thus, the military in this very instance already has been held to the strictures of local tort law, and has already been made to account for its decision to conduct the nuclear experiments which caused Rosemarie's injuries.

It is not surprising, therefore, that those courts that have closely analyzed the issue have refused to extend Feres to injuries inflicted upon civilians via a military conduit. In Jessup v. United States, No. 79-271-TUC-RMB (D. Ariz. 1980), for instance, a service member communicated a highly infectious disease to his family because of a negligent failure to diagnose the disorder. Military doctors had negligently failed to

treat the serviceman and released him from a military hospital, freeing him to infect his family, and potentially other civilians. Although constrained by Feres to dismiss the serviceman's suit, the court nonetheless upheld the family's action for their own injuries, notwithstanding that the Army's negligence was directed in the first instance at the serviceman. Of course, it could have been a totally unrelated civilian who contracted such an infectious disease, and surely no one could contend that the Feres considerations would bar that suit. At the same time, the mere fact that there is a relationship between the service members and the injured civilian provides no more of an analytical basis for applying the Feres bar.

That same point was recognized in Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980), where the court allowed the wife and daughter

of any army intelligence officer to sue for conversion of their property. While the defendants had argued that the injuries to the plaintiffs were identical to those suffered by the serviceman-relative and arose from the same intra-military conduct, 485 F. Supp. at 197, the court ruled that, no matter how similar the claims and injuries might be, "the Feres doctrine simply does not apply when a civilian relative of a serviceman has been injured by actions of military personnel." 485 F. Supp. at 198.²

² In a related vein, the court in Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980), recognized that under the FTCA, a serviceman has a cause of action for the negligent prenatal care which resulted in the birth of a child with Down's Syndrome. While the court rejected the child's "wrongful life" action, following the weight of jurisprudential opinion on this difficult subject, it did permit the serviceman to pursue a derivative action for the somatic injury of his child. Thus, Phillips is another case which rejects the idea that the military status of the father will destroy a cause of action founded upon a somatic injury to the family.

In contrast, those cases which have reached the opposite result, and have denied the injured children of servicemen any possibility of remedy, Monaco v. United States, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989, (1982); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3086 (1983); Laswell v. Brown, 683 F.2d 261 (8th Cir. 1982), cert. denied, Laswell v. Winberger, ___ U.S. ___ 103 S.Ct. 1205 (1983); Scales v. United States, 683 F.2d 970 (5th Cir. 1982), cert. denied, ___ U.S. ___ 103 S.Ct. 1772 (1983); In re Agent Orange Products Liability Litigation, 506 F. Supp. 762, 781 (E.D.N.Y. 1980), have all been overly simplistic in reflexively misapplying the Feres holding to this very different factual setting. Like the Circuit Court below, not a single one of the above authorities analyzes the Brown decision.

Similarly, there is a striking lack of consideration in these opinions of whether the rationale which underlies the Feres holding might be germane to a civilian's FTCA action.³

³ It is precisely this point which distinguishes this case from Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977). In that case, the underlying injury was inflicted upon a serviceman on active duty, and the third-party action against the government alleged a breach of duty to that serviceman. In that circumstance, the Supreme Court concluded that the Feres rationale retained its force. However, here, where the injury is directly inflicted upon a civilian, and where the breach of duty was one owed directly to that civilian, a different result is inevitable where the Feres analysis is employed. Of course, the Stencel holding requires this Court to make precisely such an analysis of the applicability of the Feres rationale.

Instead, these cases seem to attribute mechanical and talismanic significance to the government's assertion that the injuries inflicted are "derivative." Completely lacking in these cases is the realization that the same conduct which resulted in the irradiation of the serviceman father could also breach a separate duty owed by the government to that serviceman's unborn children. In short, these cases are flatly mistaken when they reflexively characterize claims by civilians for their own somatic

(footnote continued)

The Circuit Court further erred in its reliance on this Court's recent decision in Chappell v. Wallace, ___ U.S. ___, 76 L.Ed.2d 586 (1983), a case entirely inapplicable to

(footnote continued from previous page)
injuries as derivative merely because their servicemen fathers acted as the unwitting conduits of injury.

The government's intimation in its moving papers below that the decisions of Judge Stern, and of Judge Shapiro in a companion case in the Third Circuit, Hinkie v. United States, 524 F. Supp. 277 (E.D. Pa. 1981) rev'd ___ F.2d ___ (3d Cir. No. 82-1554 August 18, 1983) represent bizarre aberrations in an otherwise solid phalanx of judicial disapproval of these civilian FTCA actions is simply untrue. In addition to the two trial courts in this Circuit, both the Jessup court and the Sigler v. LeVan court, already mentioned, have upheld such FTCA actions. Similarly the trial court in Laswell v. Brown, 524 F. Supp. 847 (W.D. Mo. 1981) ruled that the children of irradiated servicemen "could bring suit against the United States under the FTCA for any injuries they sustained" 524 F. Supp. at 850. By the same token, the trial court in Scales v. United States, *supra*, in rendering a substantial verdict for plaintiff, necessarily concluded that there was no Feres bar to that action. And of course, one need only read Judge Ginsberg's forceful and well-reasoned dissent in Lombard v. United States, *supra*, to appreciate that there is anything
(footnote continued)

the instant civilian action. The sole issue in Chappell was whether to recognize, for the first time, a Bivens cause of action in favor of active duty military personnel against military officers, for acts of racial discrimination against Navy servicemen on active duty. That case did not concern the FTCA, did not concern a civilian plaintiff, and was not addressed to a suit against the United States. In short, Chappell bears absolutely no relation to the instant case.

Not surprisingly, in declining to announce, in Chappell, a Bivens cause of action, this Court did not address, let alone suggest, the applicability of Feres to an FTCA

(footnote continued from previous page)
but a judicial consensus developed on the issue here presented for review. Certainly this Court, cannot fail to be struck by the contrast between the carefully reasoned approaches of the trial court as well as Judges Shapiro and Ginsberg, and the reflexive conclusory holdings relied upon by the government.

claim by a civilian. After all, a civilian's right to sue the United States under the FTCA was long ago established by this Court in Brown. Indeed, even in the context of a former serviceman suing under the FTCA for a service-related injury, this Court affirmatively rejected any Feres argument. In short, the Circuit Court's misinterpretation of Feres, along with its erroneous reliance in Chappell, presents erroneous precedent which should be reviewed and corrected by this Court.

POINT III

THE CIRCUIT COURT'S INTERPRETATION OF THE FTCA, WHICH TREATS ROSEMARIE MONDELLI DIFFERENTLY FROM SIMILARLY SITUATED CIVILIAN INFANTS, PURELY ON THE BASIS OF HER STATUS AS THE CHILD OF A FORMER SERVICEMAN, PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW, WHICH SHOULD BE REVIEWED AND SETTLED BY THIS COURT

In dismissing Rosemarie's claim for no reason other than her status as the daughter of a former serviceman, the Circuit Court placed a gloss on the FTCA which, if allowed to stand, renders the statute unconstitutional.

This Court has long acknowledged as an obvious fact that "no child is responsible for his birth," Weber v. Aetna Casualty & Surety Co., 406 U.S. 165, 175 (1972), and has repeatedly, in recent years struck down as unconstitutional, legislation penalizing infants because of some status or legal disability of their parents. See e.g., Plyler v. Doe, 457

U.S. 202 (1982) (children of illegal immigrants may not statutorily be denied the benefits of public education); Mills v. Habluetzel, 456 U.S. 91 (1982) (one year statute of limitation from birth for an infant to commence a paternity suit is denial of equal protection); Trimble v. Gordon, 430 U.S. 762 (1977) (Illinois probate statute limiting the right of illegitimate children to inherit is denial of equal protection); Gomez v. Perez, 409 U.S. 535 (1973) (Texas law denying illegitimate child right to inherit from natural father is denial of equal protection); Weber v. Aetna Casualty & Surety Co., *supra*, (statute denying illegitimate child workers compensation benefits is denial of equal protection); Levy v. Louisiana, 391 U.S. 68 (1968) (statute denying illegitimate child right to recover for wrongful death of parent is denial of equal protection).

Under circumstances identical to Rosemarie's, civilians have been allowed to recover under the FTCA for injuries to themselves or their property for exposure to radioactive fallout from nuclear tests. Thus, an infant, who, because her civilian father or mother was exposed to radiation that caused defective sperm or ova, is born suffering from some injurious disease or condition, would be able to sue under the FTCA for her injury. And certainly that injury would not be labeled as derivative of her parent's. Indeed, government counsel conceded as much in the District Court below. And yet, if the Circuit Court's decision is permitted to stand, Rosemarie Mondelli would be denied recompense for the exact same injury.

Simply put, under the holding of the Circuit Court Rosemarie is treated differently than similarly situated civilian infants sole-

ly because of her status as the daughter of a former serviceman. Denying Rosemarie the right to recover under the FTCA would thus place an intolerable burden on her fundamental right to seek redress and could only be justified by a substantial if not compelling state interest. See e.g., Trimble v. Gordon, supra; Matthews v. Lucas, 427 U.S. 495 (1976); Weber v. Aetna Casualty & Surety Co., supra. Indeed, in the cases cited, where there existed an unquestioned state interest in protecting legitimate family relationships, cf. Trimble v. Gordon, supra, 430 U.S. at 769, or in regulating the impact of illegal immigration, Plyler v. Doe, supra, statutes were nevertheless struck down as denying equal protection to the children involved. Surely here, where Rosemarie is a legitimate child, and where her father, rather than being an illegal immigrant, is an honorably discharged

veteran of our armed forces, there is no conceivable rationale, let alone compelling basis to justify denying Rosemarie the right to suit available to any other child.

Rosemarie's father was, at most, an innocent and unwitting conduit for his daughter's injuries. Her claim for direct injury cannot constitutionally turn upon her father status. To bar Rosemarie's claims is thus to discriminate against her on the basis of her father's status in a manner that the Supreme Court disapproved in Plyler v. Doe, *supra*, and which violates her right to equal protection under the law.

In the proceedings below, the government not only failed to offer a compelling interest which would justify such disparate treatment, but it did not even offer a rational basis. Nor do the Feres policy considerations present any basis for allowing the child of an irra-

diated civilian to sue while denying that same right to a child of an irradiated serviceman. Neither individual has an alternative remedy available to them, neither has taken part in the "distinctively federal relationship" between the government and the armed forces because neither has joined the service, and military discipline, if not irrelevant to both, is surely no more of a factor for Rosemarie than for a similarly situated civilian.

The Circuit Court's decision to bar Rosemarie's claim turned on the misapprehension that foreclosing Rosemarie from recovery would preclude review of the propriety of the military conduct involved in the atomic tests. [A13]. Such review, however, is already occurring in the other civilian cases. Thus, there is not even a rational basis for barring Rosemarie's claims under the FTCA. Whether

the violations of her constitutional rights are characterized as protected by the equal protection or the substantive due process doctrines, then, it is clear that a great injustice under our Constitution will be done if she is deprived of a remedy for personal injury merely because of her father's past military status.⁴

CONCLUSION

In any circumstance, it is nothing short of abominable to visit the sins of the parents

⁴ Even a serviceman does not give up all his constitutional rights upon entering the armed forces. And, the Supreme Court has decidedly curtailed the Uniform Code of Military Justice jurisdiction over civilians. See Reid v. Covert, 354 U.S. 1 (1956); Toth v. Quarles, 350 U.S. 11 (1955); O'Callahan v. Parker, 395 U.S. 258 (1969); Relford v. Commandant, 401 U.S. 35 (1971). "Military law in peacetime is now only constitutionally applicable to those subject to military discipline, and then only if a crime is service-connected." Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 Mich. L. Rev. 1099, 1115 (1979).

upon their children. It would be particularly outrageous to do so here, where the only "sin" committed by the parent was that of serving honorably in the Armed Forces of this country. If, as this Court has only recently held, legislation which places "the onus of a parent's misconduct [upon] his children does not comport with fundamental conceptions of justice," Plyler v. Doe, supra, 457 U.S. 202, 72 L.Ed.2d at 801, then surely it would violate simple justice to deny an injured child a remedy solely on the basis of her father's status.

Yet, Daniel Mondelli's status as a civilian is the sole justification offered by the Court below for denying Rosemarie her day in court. It would be both shocking and disgraceful for the United States to exploit Daniel Mondelli's faithful and devoted service to it in an endeavor to avoid carrying out its

legal obligations to Rosemarie. This is all the more true since this Court, many years ago, in United States v. Brown, *supra*, essentially rejected the very argument relied upon by the Circuit Court.

It is difficult to imagine any court willingly denying one such as Rosemarie Mondelli the right to seek redress commonly available to all other civilians, especially, where as here, the plain language of the statute requires no such result, and where there is not a single sound policy basis or rationale to justify so harsh an outcome.

Finally, it is axiomatic that a Court should, whenever possible, strain to avoid construing a statute so as to produce an unconstitutional result. E.g. International Assoc. of Machinists v. Street, 367 U.S. 740, 749-750 (1961). For this reason alone, this

Court should review and settle this important
issue of constitutional law.

Respectfully submitted,

Steven J. Phillips
KREINDLER & KREINDLER
99 Park Avenue
New York, New York 10016
(212) 687-8181

Counsel for Petitioner

Of Counsel:
Steven J. Phillips
Donald I. Marlin
Diane M. Paolicelli

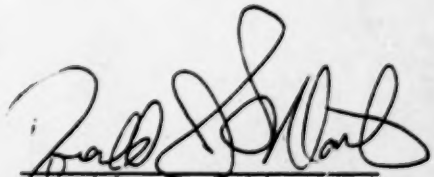
CERTIFICATE OF SERVICE

Donald I. Marlin, an attorney for Plaintiff-Petitioner and a member of the bar of this Court, certifies that on the 13th day of October, 1983, copies of the foregoing Petition for a Writ of Certiorari were served by mail upon all parties required to be served, by placing same in the first class service of the United States Post Office.

The Solicitor General of the United States
Department of Justice
Washington, D.c. 20530

Susan Engelman
Assistant Director
Torts Branch, Civil Division
U.S. Department of Justice
Washington, D.C. 20530

W. Hunt Dumont
United States Attorney
Federal Building
907 Broad Street
Newark, NJ 07102


Donald I. Marlin

APPENDIX

ORAL OPINION OF THE DISTRICT COURT

THE COURT: My reasons are as follows:

When you start from the proposition that Feres and its progeny does not by black letter law compel me to dismiss this case and that, therefore, I am free to take a look at the situation before me in light of all the existent precedents, I am very much persuaded that the judicially-created exception -- and it is a judicially-created exception with all that means in our Democratic processes for the federal Tort Claims Act, which exception was made to prevent servicemen from being able to sue, upon at least one stated ground, that judicial discipline will be preserved and the second stated ground that the expense to the individual was ameliorated by the fact there was ample remedy afforded by the lavish

veterans benefit which the Congress had bestowed.

All of these grounds are either not present at all before me today, or, in the case of the notions of judicial discipline, so watered down as to be without substantial weight.

The plaintiff before me is not a serviceman or woman, has never been under military orders. Has never sworn an oath to obey anybody's orders. Could never be compelled by the military to do anything under the Code of Military Justice. The little girl who sues here 'claims -- and for purposes of this argument and decision today, we take as true the Complaint -- I think you have no quarrel with that, do you?

MS. ENGELMAN: No.

THE COURT: -- claims to have been injured as a result of a deliberate and wilful

act by the United States Government done under circumstances where it was readily foreseeable that their conduct would, in fact, cause harm to her and to other civilians similarly situated.

I can see no danger to military discipline in permitting such a suit. I'm frank to admit, and, as the colloquy would show, in any event, I can see very little danger to military discipline if we were to permit even soldiers to sue under such circumstances since, in fact, their duty is to obey orders, in the first instance, and since any failure by them to obey an order would mean an immediate judicial reprisal instigated not by them but by the United States Government, itself.

But putting that to the side, I can see no more danger in military discipline in permitting this civilian to sue than any other

civilian to sue for any other kind of military decision which injurs other civilians. I find no authority in the words of the statute of the United States Congress for this Court to read into those words a disenfranchisement of this little girl as opposed to any other little girl.

If she were the yet unborn child of a military -- withdrawn -- a civilian resident of Los Alamos or some other area where this test was performed, she would have the right to sue. The government has conceded as much.

I find no words in the statute. I find no policy of Feres. I certainly find no ameliorating circumstance of her getting any benefit in any other way which would authorize this Court to turn its face away from her.

A word more about this military discipline. If we cannot rely upon our soldiers and upon our civilians who lead our

soldiers to have some modicum of care and respect for the men that they lead, simply because they wouldn't want to subject them to life-threatening experiments in peacetime, if we can't rely on that natural and expected course of dealing, then there is a clear and present need for the Courts to look at it.

We, after World War II, prosecuted aliens for conducting those kinds of experiments on other aliens. We, under principles of international law, not in an international tribunal, but in a purely American tribunal.

There were 12 of them after World War II. One of them, by the way, was called the Justice Case. We prosecuted judges and lawyers of Germany for the manner in which they conducted their courts and dealt with Germans. We prosecuted German doctors for the manner in which they dealt with and treated

and experimented on Poles and Germans and Russians.

Now, I don't say the defendants in this case have necessarily done what the plaintiffs say they did, but for purposes of this argument I must take it as true and in the face of an allegation that representatives of this government have deliberately, knowledgeably and intentionally subjected as yet unborn servicemen to radical and dangerous experiments with atomic energy, this Court will not willingly turn its face away.

And where, as here, we are not bound by any direct precedent from any superior court to which we owe the duty of obedience, and where, as here, all there is are precedents from other courts, either of the same level or of a superior level in other Circuits where we are not bound to follow them, we respectfully yet firmly decline to do

so.

As long as I am free to decide, I'm going to decide in this way. I think those reasons are good enough. They are not, perhaps, very elegant, but it is an oral decision. It tells the Third Circuit why I'm doing what I'm doing. And they, of course, will undoubtedly consider it and write a much finer opinion, either way they want to come out.

You will want to find out whether you want it certified?

MS. ENGELMAN: Yes, I will.

MR. PHILLIPS: Thank you, your Honor.

MS. ENGELMAN: Than you.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5545

ROSEMARIE MONDELLI

v.

UNITED STATES OF AMERICA,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

(C. A. No. 81-3658)

Argued: April 25, 1983

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges*,
and STAPLETON, *District Judge**

(Opinion Filed: July 15, 1983)

J. PAUL McGRATH
Asst. Attorney General
W. HUNT DUMONT
United States Attorney
SUSAN P. ENGELMAN (Argued)
JEFFREY AXELRAD
Department of Justice
Washington, D.C. 20530
Counsel for Appellant

*Hon. Walter K. Stapleton, United States District Court for the District of Delaware, sitting by designation.

KREINDLER & KREINDLER
New York, New York 10016
Counsel for Appellee

Of Counsel
STEVEN J. PHILLIPS (Argued)
DONALD I. MARLIN
MICHAEL D. YOUNG
DIANE M. PAOLICELLI

OPINION OF THE COURT

ADAMS, *Circuit Judge*.

Rosemarie Mondelli brought this action for damages under both the Federal Tort Claims Act¹ and the Constitution for genetic injuries caused by her father's exposure to radiation while he was on active duty in the United States Army. The district court denied the motion of the United States to dismiss the FTCA claim for lack of subject-matter jurisdiction, holding that the Act waived the sovereign immunity of the United States to this claim. The district court then determined, pursuant to 28 U.S.C. §1292(b) (1976), that the question of the applicability of the FTCA claim presented "a controlling question of law as to which there is substantial ground for difference of opinion," and that an interlocutory ap-

1. The Federal Tort Claims Act [FTCA] provides that the district courts shall have exclusive jurisdiction over:

civil actions on claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §1346(b) (1976).

peal on that issue would "materially advance the ultimate termination of the litigation." *Id.* This Court then granted the request for interlocutory review.

Although we acknowledge the result to be a harsh one, we conclude that this portion of Mondelli's suit is barred by the doctrine of *Feres v. United States*, 340 U.S. 135 (1950). Accordingly, we will reverse the order of the district court and remand for proceedings consistent with this opinion, including disposition of Mondelli's constitutional claims.

I.

Rosemarie Mondelli is a 22 year-old civilian born with retinal blastoma, a genetically transmitted cancer of the retina. In 1953 Rosemarie's father, Daniel Mondelli, participated in the test of a nuclear device while on active military duty. The complaint, whose allegations we accept as true for the purposes of this appeal, recites that Daniel Mondelli was ordered by his commanding officers to stand near the site of a nuclear explosion, and to march toward the blast area, without the benefit of protective clothing. Daniel Mondelli is alleged to have been exposed at that time to massive doses of radiation. Rosemarie's injuries are said to derive from this exposure. In August of 1962, Rosemarie lost the use of her left eye.

Although the FTCA waives the immunity of the United States for the torts of its agents,² the Supreme Court has held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States*, 340 U.S. 135, 146 (1950). The injury to Daniel Mondelli was concededly incurred incident to military service. Conse-

2. A variety of exceptions to the FTCA insulate the United States from liability in narrow classes of cases. See 28 U.S.C. §2680 (1976). None of these exceptions is here relevant.

quently, the doctrine of *Feres* would bar any tort claim against the United States by Daniel. See *Jaffee v. United States*, 592 F.2d 712, 716 (3d Cir.), cert. denied, 441 U.S. 961 (1979). Although the *Feres* doctrine has been the subject of searching examination in the academic community³ and by the judiciary,⁴ the Supreme Court has only recently reaffirmed its vitality. See *Chappell v. Wallace*, 51 U.S.L.W. 4733, 4734-35 (U.S. June 13, 1983); *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-73 (1977). The question presented, therefore, is whether Rosemarie Mondelli can maintain an action under the FTCA against the United States for injuries that derive from her father's exposure to radiation, when her father himself would be barred by *Feres* from raising a claim for his own injuries.

II.

The Supreme Court in *Feres* articulated a number of rationales for insulating the United States from liability for the decisions of its military officers. See *Feres*, *supra*, 340 U.S. at 141-45. The soundest of these grounds, and the only ground that is of relevance to this action, is the "peculiar and special relationship of the soldier to his superiors" in military service. *United States v. Brown*, 348 U.S. 110, 112 (1954).⁵ As the Court reaffirmed only recently:

3. See Note, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U.L. Rev. 601, 629-35 & n.173 (1980); Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 Mich. L. Rev. 1099, 1102-21 (1979).

4. See *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981); *Hunt v. United States*, 636 F.2d 580, 587-89 (D.C. Cir. 1980); *Parker v. United States*, 611 F.2d 1007, 1010-11 (5th Cir. 1980).

5. The Court has attributed three rationales to the *Feres* doctrine: (1) the "distinctively federal" character of the relationship between the government and its armed forces, an allusion to the

The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection. . . . Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment.

Chappell v. Wallace, *supra*, 51 U.S.L.W. at 4734-35.

In many circumstances an action by a relative or dependent would raise the same issues, and require the same scrutiny of military decisions, as would an action by a soldier or sailor against the United States. The Supreme Court addressed a similar situation in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977). There it held that the rationale of *Feres* prohibits a third-party indemnity action against the United States:

FTCA's provision for liability according to the laws of the several states; (2) the availability of benefits under the Veterans Benefits Act; and (3) the necessity for maintaining discipline in the military services. See *Stencel Aero Engineering Corp.*, 431 U.S. 666, 671-72 (1977). This court has found only the latter two grounds persuasive, however, see *Valn v. United States*, No. 82-1568, slip op. at 6 & n.4 (3d Cir. 1983), citing *Jaffee v. United States*, 663 F.2d 1226, 1233 n.7 (3d Cir. 1981) (*in banc*), *cert. denied*, 102 U.S. 2234 (1982). The Supreme Court and the courts of appeals are agreed that *Feres* is best explained solely by the necessity for preserving military discipline. See *Chappell v. Wallace*, *supra*, 51 U.S.L.W. at 4734; *United States v. Muniz*, 374 U.S. 150, 162 (1963); *Scales v. United States*, 685 F.2d 970, 973 (5th Cir. 1982); *Hunt v. United States*, 636 F.2d 580, 599 (D.C. Cir. 1980). In any event, Rosemarie Mondelli is not herself a veteran, and the United States conceded during oral argument that veterans' benefits are not available to her. The necessity to preserve military discipline is, therefore, the only rationale that would appear to be applicable to this case.

[I]t seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions.

431 U.S. at 673. An action for damages in which the litigation would take the same form as a suit proscribed by *Feres* is therefore itself within the ambit of the *Feres* doctrine.

An action for damages by Rosemarie Mondelli would raise the same issues, and take the same form, as an action by her father Daniel. The complaint avers that Rosemarie's injuries derive from her father's exposure to radiation. At trial, Rosemarie would be required to contest the prudence of exposing her father to radiation. This examination is foreclosed by *Feres*.⁶

We sense the injustice to Rosemarie Mondelli of this result. Rarely does the law visit upon a child the consequences of actions attributed to the parents. Cf. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). Nevertheless, the Supreme Court has construed the

6. See *Lombard v. United States*, 690 F.2d 215, 223-27 (D.C. Cir. 1982); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982); *Laswell v. Brown*, 683 F.2d 261, 264-67 (8th Cir. 1982); *Monaco v. United States*, 661 F.2d 129, 133-34 (9th Cir. 1981); *Seveney v. United States*, 550 F. Supp. 653, 660 (D.R.I. 1982); In re "Agent Orange" Product Litigation, 506 F. Supp. 762, 780-81 (E.D.N.Y. 1980).

FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline. Although these are delicate policy judgments, they are in the final analysis committed to Congress. Consequently, we conclude, with reluctance, that the claims of Rosemarie Mondelli are barred.

III

The order of the district court entered on July 19, 1982, will be reversed and the case remanded for proceedings consistent with this opinion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals
for the Third Circuit*

United States Court of Appeals
FOR THE THIRD CIRCUIT

No. 82-5545

ROSEMARIE MONDELLI

vs.

UNITED STATES OF AMERICA,
Appellant

(D. C. Civil No. 81-3658)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE ----- DISTRICT OF NEW JERSEY

Present: ADAMS and HIGGINBOTHAM, Circuit Judges and STAPLETON, District Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the ----- District of New Jersey and was argued by counsel April 25, 1983.

On consideration whereof, it is now here ordered and adjudged by this order Court that the judgment of the said District Court, entered July 20, 1982, be, and the same is hereby reversed and the cause remanded for further proceedings consistent with the opinion of this Court. Costs taxed against appellee.

ATTEST:


Clerk

July 13, 1983

* Honorable Walter K. Stapleton, United States District Court for the District of Delaware, sitting by designation.